**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,
JAIPUR BENCH, JAIPUR.**

**D. B. CRIMINAL JAIL APPEAL NO.121/2002
(Ramesh Vs. State of Rajasthan)**

Date of Judgment: 4th July, 2007.

**Hon'ble Mr. Justice Shiv Kumar Sharma
Hon'ble Mr. Justice R. S. Chauhan**

**Mr. Satyapal Poshwal, Amicus Curiae, for the Appellant.
Mr. M.L. Goyal, PP for the State.**

(Per R.S. Chauhan J.):

REPORTABLE

The alleged rape and murder of a five years old girl, the conviction for offences under Sections 366, 376 and 302 of Indian Penal Code ('IPC', for short) has brought the appellant before this court.

According to the prosecution, on 23.2.01, one Gopal (P.W.1) lodged a written report (Ex.P.1) before the Police Station, Ramganj Mandi, Kota wherein he claimed that "he is a resident of village Kudayala, Police Station, Ramganj Mandi. His neighbour is Ramesh (the appellant before us). On that day his son Birdhi Lal had gone out to his work. At his house his wife, his daughter-in-law and he

himself were left. Subsequently, both his wife and he left the house. Around 6-7 O' Clock in the evening his grand-daughter Jiya, aged five years, was playing near the house. His daughter-in-law suddenly noticed that the child was missing. She was informed by the daughter of Manak Meghwal that Ramesh was standing with her daughter Jiya behind the wall of the house of Chhiter Meghwal. But, she could not tell them where he has taken the small child. Upon this information, the family members searched for the child. Eventually, they found her body floating in their own well. Other people had gathered at the well namely, Laxminarain, Gopalji etc. Ramesh always used to offer biscuits and toffees to Jiya. Ramesh has killed the small child. When they searched for Ramesh, he ran away. Even previously, he was involved in a criminal case at Ramganj Mandi." On the basis of this written report a formal FIR, FIR No. 55/2001 (Ex. P.3) was chalked out for offences under Section 302 IPC, read with Section 3 of the SC & ST (Prevention of Atrocities) Act and the investigation commenced. The appellant was subsequently charged for

offences under Section 364 and 302 IPC. However, during the course of the trial Dr. K.K. Goswami (P.W. 11) testified in the Court that the deceased was subjected to rape prior to her death. After recording this evidence, charges for offences under Sections 366 and 376 IPC were framed against the appellant. Therefore eventually, the appellant was tried for offences under Sections 366, 376 and 302 IPC. In order to support its case the prosecution examined fourteen witnesses and submitted twenty-three documents. Although the accused did not examine any witness in his support, he did submit two documents in defence. After going through the oral and documentary evidence, vide judgment dated 5.12.2001, the trial court convicted and sentenced the accused as under :-

i) **For offence under Section 366, the appellant was sentenced to ten years of rigorous imprisonment and was fined Rs. 500/- and to further undergo three months of simple imprisonment in default thereof ;**

ii) **for offence under Section 376 he was sentenced to 10**

years of rigorous imprisonment and was fined Rs. 500/- and to further undergo three months of simple imprisonment in default thereof;

iii) for offence under Section 302 he was sentenced to life imprisonment and was also fined Rs. 500/- and to further undergo three months of simple imprisonment in default thereof. All the sentences were ordered to run concurrently and the benefit of Section 428 of Cr.P.C. was also granted to the appellant. Hence, this appeal before this Court.

Mr. S.P. Poshwal, the learned Amicus Curiae, has vehemently argued that the case is based on circumstantial evidence. However, the chain of circumstances are incomplete. Therefore, the conviction is unsustainable. Secondly, that although the offence of rape has been alleged, but there is no evidence on record to prove the commission of the alleged crime. Despite the fact that the underwear of the deceased child was sent to FSL, despite the fact that three slides were also sent to the

FSL, there is no FSL Report proving the existence of the sperms of the accused person. Therefore, the corroborative evidence is singularly missing. Moreover, the physical examination of the accused does not point to his having committed the alleged rape with the child. Thirdly, but for the evidence of the last scene evidence, which is weak in its very nature, there is no other evidence to prove the involvement of the appellant in the alleged crime.

On the other hand, Mr. M.L. Goyal, the learned Public Prosecutor for the State has strenuously argued that the chain is complete which unerringly points towards the guilt of the appellant. According to P.Ws. 4, 5 and 6 the deceased was last scene in the appellant's company. According to PW 12, Smt. Sampat, the mother of the deceased child, when she asked the appellant as to the whereabouts of the child, he denied that the child had gone with him or that he had taken the child. Thus, the appellant had given a false statement. Moreover, when the people reached his house, the appellant ran away from his

place. All these links in the chain of circumstances unerringly point towards his guilt. Therefore, the learned P.P. has supported the impugned judgment.

We have heard both the learned counsels, have examined the record, and have perused the impugned judgment.

Gopal (P.W.1), the grand-father of the deceased child, testifies that the appellant is known to him as their houses are near each other. About 5-6 months back, he and his wife had gone to their farm and his son had left for his work. Only his daughter-in-law, Smt. Sampat and her three daughters were at home. When he came back to his house, his daughter-in-law told him that Jiya was missing. When he enquired from the children in the neighbourhood, he was informed that the appellant had given chocolate to Jiya and had taken her away. He, alongwith other villagers, namely, Laxminarain and Ram Kumar and few more persons began searching for the missing child. When Ramesh came back to his house, his daughter-in-law

caught hold of him and asked him about the whereabouts of the minor child. However, he managed to free himself from the clutches of his daughter-in-law and ran away. Subsequently, when they came to his own well, they discovered the body of the missing child inside the well. He further tells us that the appellant used to come to his house off and on and his wife used to tie a 'Rakhi' on the appellant. He also used to give chocolate to the children. He further claimed that even earlier the appellant had killed a boy in Ramganj Mandi. In his cross-examination he states that he knew the appellant ever since he has born, that the appellant used to come to his house off and on, that the appellant has daughters, elder one aged five years and the younger one aged three years. He has denied the suggestion that Jiya went on her own to the well and fell into it.

Ramkishan (P.W.2), states that when he went to the appellant's house looking for him, the appellant ran away. Radhey Shyam (P.W.3) tells us that on the fateful day

around 2-3 p.m. the appellant came to his shop and bought chocolates. Mangi Bai (P.W.4), Manju (P.W.5) Sumitra (P.W.6) are three child witnesses who have clearly stated that they saw Ramesh with the child prior to her death. In the words of Mangi Bai (P.W.4), Jiya was eating chocolate and walking behind Ramesh; when she asked Jiya as to where she is going, she did not answer her but both of them were going towards 'Chamaron Ka Mohalla'. This was around 7.00 O' Clock in the evening. Similar are the statements of Manju (P.W.5) and Sumitra (P.W.6). Smt. Sampat (P.W.12), tells us that her daughter, Jiya, had taken the meal with her. After the dinner, the daughter had gone out of the house and was playing on the 'Chabutra'. Ramesh was sitting there and the children of the neighbourhood were playing there. After 15-20 minutes, when she looked at the 'Chabutra', she found her little daughter missing. She had also noticed that Ramesh was missing too. One of the children told her that Ramesh has taken the little girl with him. After a while when Ramesh came back to his house, she asked Ramesh about Jiya's

whereabouts. But, he told her that he had not taken the child with him. Subsequently, her in-laws and the other people of the village discovered the body of the child in the well of her father-in-law.

A bare perusal of these testimonies clearly reveal that the appellant is a neighbour of the deceased child, that even earlier he used to offer her chocolates, that he had won the confidence, the love and affection of the child, that he was last seen with the child before her death and when confronted by the child's mother, he denied taking the child with him, that the body of the child was discovered in the well.

Dr. Kailash Goswami (P.W.11) states that when the body of the child was brought before him, the right arm of the child was broken and there was swelling on the arm. Moreover and most importantly, the vagina of the child was ruptured and there was blood present on the vagina. He had prepared three slides of the blood from the vagina and

had given it to the police. According to him the child had died due to drowning. He has proved the Post-Mortem Report (Ex.P.8). In his cross-examination he clearly denies that there were no symptoms of rape being committed on the child. He clearly states that "because the vagina was ruptured, it is denied that there were no symptoms of rape." He also states that "there was abrasion on the back of the thighs of the child."

The principle with regard to appreciation of evidence in circumstantial case is, indeed, well settled. The Hon'ble Supreme Court in the case of State of Goa Vs. Sanjay Thakran & Anr. (2007) 3, SCC 755 has reiterated the principles as under :-

> **When the case rests upon circumstantial evidence, such evidence must satisfy the following tests:**
>
> **(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
>
> **(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

Applying these principles to the present case it is obvious that the appellant was a trusted neighbour of the deceased girl. The terms of the families were good to the extent that the grand-mother of the child used to tie 'Rakhi' and had claimed the appellant to be her “brother”. As a trusted family member, he would offer chocolate to the children of the family. On the fateful day the appellant had bought chocolates from the shop of Radhey Shyam (P.W.3) in the afternoon. In the evening, the appellant was sitting at the 'Chabutra' where the children, including the deceased child, were playing. Again, he had offered chocolate to the child and was last seen accompanied by

the child. When the appellant was asked about the whereabouts of the child by Smt. Sampat (P.W.12), he categorically denied having taken the child. Thus, he offered a false explanation to the child's mother. Within hours, the child's body was discovered floating in the well. According to autopsy report the child's private part was injured, there was blood on her vagina and abrasions on the back of the thighs of the child. This clearly proves that prior to her death, the child was subjected to rape. All these links in the chain of circumstances unerringly point towards the guilt of the appellant. These circumstances are inconsistent with his innocence. Even in his statement under Section 313 Cr.P.C. the appellant has not offered any explanation. He has merely denied the evidence that was recorded against him. The fact as to what happened to the child after she was last seen with the appellant can only be within the knowledge of the appellant; yet, he offers no valid explanation. The only explanation that has come from him is a blanket denial. Such an explanation amounts to a false statement. Thus, the case against the appellant is

quite well established.

The children are the future of every nation. The children not only need the protection of their parents, but also need to be protected by the society at large. Recent studies have clearly revealed that child abuse and specially sexual abuse of the children is a national epidemic. Since children are innocent, voiceless and defenceless, they tend to be the easiest victims of sexual abuse. The rape of a child is not only a grave crime, but is also morally a depraved act. Such an act needs to be condemned and deprecated in the harshest terms legally, morally and socially. In the case of State of Rajasthan Vs. Om Prakash (2002) 5 SCC 745 the Hon'ble Supreme Court has observed as under :-

> **“Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. It is a crime against humanity. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are the country's future. Hope of**

tomorrow rests on them. In our country a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuse. These factors point towards a different approach required to be adopted. It is necessary for the courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in the Constitution of India in Article 39."

In the case of State of M.P. Vs. Munna Chobey & Anr. (2005) 2 SCC 710, the Apex Court stated as under :-

"The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle McGautha v. State of California that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various

circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished."

In the case of Dhananjoy Chatterjee Vs. State of West Bengal (1994) 2 SCC 220 the Hon'ble Supreme Court observed as under:-

"In recent years, the rising crime rate – particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

In our opinion, the measure of

punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

In the case of Om Prakash (supra), the Hon'ble Supreme Court had held that "having played with the life of a child the respondent does not deserve any leniency and for him sympathizing on the ground sought for will be wholly uncalled for." In the present case the appellant has betrayed the trust of the family and of the child; he has subjected an innocent child of five years to his carnal lust; he has mercilessly thrown the child into the well, where she died of drowning. His acts are not only heinous crimes, but also depraved, hence deplorable.

For these reasons, we find no merit in the

instant appeal and the same accordingly stands dismissed. Conviction and sentence awarded to appellant under sections 302, 366 and 376 IPC are maintained.

(R.S. CHAUHAN) J. **(SHIV KUMAR SHARMA)J.**

MRG.